Solitaire Land Sdn Bhd v Hong Leong Bank Bhd

HIGH COURT (KUCHING) — SUIT NO 22–181 OF 1999–I
IAN CHIN J
5 JULY 2001

Civil Procedure *— Security for costs — Discretion of court — Whether appellate court should disturb exercise of discretion of lower court — Security at 10% of estimate costs, whether acceptable — Balancing of competing interest of parties*

The deputy registrar had on 8 March 2001 ordered that security for costs in the sum of RM41,986.80 be given by the plaintiff to the defendant instead of the sum RM300,000 which the defendant applied for. The defendant appealed against the decision.

Held, dismissing the appeal with costs:

(1) Where a discretion has been exercised, an appellate court should be slow to disturb the discretion unless the lower court has not acted in accordance with the legal principles. In the instant case, the manner in which the lower court approach the issues was proper. Therefore, it could not be argued that the lower court had not acted in accordance with legal principles (see p 77A, D); *Keary Developments Ltd v Tarmac Construction Ltd & Anor* [1995] 3 All ER 534; *Government of Sarawak v Sami Mousawi-Utama Sdn Bhd (In liquidation)* [1998] 3 MLJ 820 and *Skrine & Co v MBf Capital Bhd & Anor* [1998] 3 MLJ 649 followed.

(2) Though learned counsel for the defendant had urged for a much higher figure he was not able to produce an authority to say that the manner in which the lower court had allowed as security for costs, that was at 10% of the estimated costs, was wrong. Far from it being wrong, what the lower court had done was the result of the balancing it had to perform between the competing interests of the parties. Upon the premises, there was no justification for disturbing the discretion which the lower court had correctly exercised (see p 77E–G).

[Bahasa Malaysia summary

Timbalan pendaftar telah pada 8 Mac 2001 memerintahkan agar jaminan untuk kos bagi jumlah RM41,986.80 diberikan oleh plaintif kepada defendan dan bukan bagi jumlah RM300,000 yang defendan telah pohon. Defendan telah merayu terhadap keputusan tersebut.

Diputuskan, menolak rayuan tersebut dengan kos:

(1) Di mana budi bicara digunakan, mahkamah rayuan sepatutnya tidak tergesa-gesa untuk mengganggu budi bicara tersebut kecuali jika mahkamah bawahan tersebut tidak bertindak menurut prinsip-prinsip perundangan. Dalam kes sekarang ini, cara di

mana mahkamah bawahan mendekati persoalan-persoalan tersebut adalah betul. Oleh itu, tidak boleh dihujahkan bahawa mahkamah bawahan tidak bertindak menurut prinsip-prinsip perundangan (lihat ms 77A, D); *Keary Developments Ltd v Tarmac Construction Ltd & Anor* [1995] 3 All ER 534; *Government of Sarawak v Sami Mousawi-Utama Sdn Bhd (In liquidation)* [1998] 3 MLJ 820 dan *Skrine & Co v MBf Capital Bhd & Anor* [1998] 3 MLJ 649 diikut.

(2) Walaupun peguam yang arif bagi pihak defendan telah mendesak jumlah yang lebih tinggi, beliau tidak dapat mengemukakan satu autoriti untuk mengatakan bahawa cara di mana mahkamah bawahan telah membenarkan sebagai jaminan untuk kos tersebut, iaitu pada 10% daripada kos yang dianggarkan, adalah tidak betul. Jauh daripada salah, apa yang mahkamah bawahan telah buat adalah kesan daripada pengimbangan yang dilakukan antara kepentingan bertentangan pihak-pihak tersebut. Berdasarkan premis tersebut, tiada justifikasi untuk mengganggu budi bicara yang telah digunakan dengan betul oleh mahkamah bawahan (lihat ms 77E–G).]

Notes

For cases on security of costs generally, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5221–5223.

Cases referred to

Government of Sarawak v Sami Mousawi-Utama Sdn Bhd (In liquidation) [1998] 3 MLJ 820 (folld)

Keary Developments Ltd v Tarmac Construction Ltd & Anor [1995] 3 All ER 534 (folld)

Skrine & Co v MBf Capital Bhd & Anor [1998] 3 MLJ 649 (folld)

Wong Ho Leng (*Raymond Kueh* with him) (*Wong Ho Leng & Co*) for the plaintiff.

Frank Tang (*Tang & Partners*) for the defendant.

Ian Chin J:

Introduction

The deputy registrar had on the 8 March 2001, ordered that security for costs in the sum of RM41,986.80 be given by the plaintiff to the defendant instead of the sum RM300,000 which the defendant applied for. The defendant appeals against the decision. When applying for the security the defendant contended that: (i) the plaintiff is an insolvent limited company which is unable to pay the defendant's costs should the defendant succeed; (ii) the plaintiff's claim is unfounded, ill-conceived, frivolous and vexatious; and (iii) the defendant has a very good prospect of defending the claim.

Principles governing fixing the amount of the security for costs

Where a discretion had been exercised, an appellate court should be slow to disturb the discretion unless the lower court had not acted in accordance with the legal principles. The lower court had considered the evidence concerning the financial status of the plaintiff and it had enumerated the matters that it considered, viz:

(a) whether the plaintiff is insolvent;
(b) the plaintiff's prospect of success in their case;
(c) whether the order for cost will stifle the plaintiff's claim;
(d) whether the defendant is responsible for the insolvency; and
(e) whether there is any admission of debt.

In doing so, the lower court has followed *Keary Developments Ltd v Tarmac Construction Ltd & Anor* [1995] 3 All ER 534 which I had followed in the case of *Government of Sarawak v Sami Mousawi-Utama Sdn Bhd (In liquidation)* [1998] 3 MLJ 820. The manner in which the lower court approach the issues are proper and also in accordance with the decisions of *Skrine & Co v MBf Capital Bhd & Anor* [1998] 3 MLJ 649. Therefore, it cannot be argued that the lower court had not acted in accordance with legal principles. The lower court dealt with all the arguments relating to the matters enumerated as (a), (b), (c), (d) and (e) and only allow 10% of the estimated costs. Hence, he allowed security for cost for the sum of RM41,986.80 which the plaintiff had already paid into court. Though learned counsel for the defendant had urged for a much higher figure he is not able to produce an authority to say that the manner in which the lower court had allowed as security for costs, that is at 10% of the estimated costs, is wrong. Far from it being wrong, what the lower court has done is the result of the balancing it has to perform between the competing interests of the parties and this is well within the principles set out in *Keary*'s case.

Conclusion

Upon the premises, there is no justification for disturbing the discretion which the lower court has correctly exercised. The appeal is, therefore, dismissed with costs to the plaintiff.

Appeal dismissed with costs.

Reported by Ezatul Zuria Azhari